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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1931.

No. 581

GEORGE J. ADAMS AND A. W. KITCHEN, COPARTNERS TRADING AS ADAMS & KITCHEN, ET AL.,
Petitioners,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AND UNION STOCK YARD & TRANSIT COMPANY,
Respondents.

BRIEF ON BEHALF OF UNION STOCK YARD & TRANSIT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SILAS H. STRAWN,
RALPH M. SHAW,
FRANK H. TOWNER,
Counsel for said Respondent.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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MAY IT PLEASE THE COURT:

In compliance with the rules of this court, petitioners have included in their petition for certiorari filed herein (pp. 3 *et seq.*) what is designated as a summary statement of the matter involved. This statement, however, is not sufficiently complete to inform this court of the essential facts developed

on the record and relied upon by the Circuit Court of Appeals in reaching its decision. A correct and full statement of the essential facts is required in every such petition (*Furness, Withy & Company* v. *Yang-Tsze Insurance Association, et al.*, 242 U. S. 430) and is particularly important in this case.

A correct statement of the essential facts is contained in the brief filed herein by the Director General of Railroads in opposition to the granting of the writ prayed for. We wish, however, to draw the court's attention in some detail to certain facts which particularly affect the status of the Yards Company in the litigation and which, in our opinion, require a denial of the petition.

STATEMENT OF FACTS.

As appears from the statement of facts contained in the petition and brief filed herein on behalf of respondent, the Director General, the Union Stock Yard & Transit Company (hereinafter called the "Yards Company"), started its operations in 1865 (R. 123). From then up to the present time, it has performed the service of loading and unloading live stock consigned from and to the stockyards in Chicago, doing the work with its own employees at platforms and other facilities owned by it. It has never at any time performed any service in the actual transportation of live stock. In 1867 it first installed a charge of 50 cents per car for loading and a charge of 25 cents per car for unloading live stock shipped to the stockyards and up to January 1, 1919, these charges were paid to the Yards Company by the railroads handling the live stock into and out of the yards (R. 124).

Up to the time of the decision in *United States* v. *U. S. Y. & T. Co.*, 226 U. S. 286, the loading and unloading charges of the Yards Company had not been contained in any tariff filed with the Interstate Commerce Commission, but after that decision, it published and filed with the Commission its Tariff No. 1, I. C. C. No. 1 (Part of Ex. 1, attached to Defts.' Ex. 1, certified to this court), stating its charges of 25 cents and 50 cents per car for unloading and loading such live stock. This tariff was published by the Yards Company alone, and on its own behalf. As a matter of fact, neither the railroads nor the Director General has ever been a party to any tariff issued by the Yards Company, and the Yards Company has never been a party to any tariffs issued by the railroads or the Director General (See Stipulation, Pars. 5,

6 and 26, R. 233, 234, 235). The first tariff published by the Yards Company remained in effect without change until May 21, 1917, and until that time the railroads continued to pay the charges of the Yards Company provided for therein. This payment was made by the railroads pursuant to the absorption provisions of their own tariffs (See p. 169, Certified Excerpts from Original Exhibits).

Effective May 21, 1917, the Yards Company published its Tariff No. 2, I. C. C. No. 2 (Part of Ex. 1, attached to Defts.' Ex. 1, certified to this court) in which it increased its charge for unloading live stock from 25 cents to 50 cents a car and increased its charge for loading live stock from 50 cents to 75 cents per car. Since the tariffs of the line-haul carriers only provided for the absorption and payment by them of charges of 25 cents and 50 cents a car, the increase in the charges of the Yards Company amounting to 25 cents a car was added to the railroad freight bills and paid by the shippers. This situation existed during the entire period of Federal control, which is the period covered by this suit, and the payments of 25 cents thus made constitute the sum sought to be recovered herein.

Later in 1917, the Yards Company filed with the Commission its Supplement No. 1 to its Tariff No. 3, I. C. C. No. 6, effective September 1, 1917 (Part of Ex. 1 attached to Defts.' Ex. 1, certified to this court), in which it undertook to cancel the tariff containing its increased charges of 50 cents and 75 cents per car for unloading and loading, this action being taken because of the theory of the Yards Company that in performing this service, it was not a common carrier and was not performing a common-carrier service. Had this supplement been permitted to become effective, the Yards Company would no longer have had a tariff on file with the Commission stating its

charges for loading and unloading. The supplement, however, was suspended by the Commission and thus prevented from becoming effective. The proceeding which resulted from its suspension was known before the Commission as its Investigation & Suspension Docket No. 1118.

Following this action of the Commission in suspending the proposed cancellation of the tariff charges of the Yards Company for loading and unloading, there was filed with the Commission, upon November 17, 1917, the complaint of the Chicago Live Stock Exchange (Defts.' Ex. 2, R. 243, *et seq.*), which complaint was docketed by the Commission under its Docket No. 9977. The defendants named therein were the Yards Company, the Chicago Junction Railway Company, and 27 line-haul carriers (R. 244).

After setting up the long existence of the 25-cent and 50-cent charges for unloading and loading live stock, the increased charges of 50 cents and 75 cents per car which became effective on May 21, 1917, and the attempt by the Yards Company to cancel its tariff charges for loading and unloading, the complaint generally alleged that the collection from the shipper of any amount for the service of loading and unloading was discriminatory and otherwise unlawful; that the legal duty rested upon the line-haul carriers to load and unload live stock at the stockyards, and that the failure of those carriers to perform this service and their failure to absorb the increased charges of the Yards Company had subjected the members and patrons of the complainant corporation (the Chicago Live Stock Exchange) to the payment of charges for transportation which were in violation of Sections 1, 2 and 3 of the Act to Regulate Commerce.

The complaint concluded with the prayer that the defendant carriers be required to desist from collecting

from complainant's members and patrons any charges for the service of loading and unloading live stock at the stockyards, and that such carriers also be required to pay to complainant's members and patrons, by way of reparation, any amounts which they had been required to pay for such loading and unloading service since the increased charges of the Yards Company had become effective. This complaint did not attack the reasonableness of the increased loading and unloading charges of the Yards Company (See p. 20, Certified Excerpts from Original Exhibits).

It was consolidated with Investigation & Suspension Docket No. 1118, and a hearing in the consolidated case was held by the Commission. The testimony and other exhibits received on this hearing were introduced in the record as Defendants' Exhibits 5 and 6 (R. 268) and 12 to 22, inclusive (R. 271-276). All these exhibits are certified to this court as original exhibits. On this record, the Commission made its first report, dated February 11, 1919, at 52 I. C. C. 209 (Pltfs.' Ex. 1, R. 121, *et seq.*).

In this report, the Commission found that the Yards Company was performing a common-carrier service in loading and unloading live stock; that it should not be permitted to cancel its tariff charges for performing this service; that the duty of loading and unloading live stock at the Chicago stockyards rested upon the shipper and that the failure of the line-haul carriers to absorb the charges did not prejudice shippers to the Chicago stockyards. The complaint was dismissed, and by subsequent order dated March 13, 1919, the Commission required the Yards Company to withdraw its proposed cancellation of its tariff charges for loading and unloading (Par. 33 of Defts.' Ex. 1, R. 237, 243).

With respect to this service, the Commission held that a fair price could be exacted for its performance (R.

136); that no attempt had been made to prove that the charges of the Yards Company were unreasonable (R. 135); and that since the Yards Company, in performing the loading and unloading service, was performing a common-carrier service, its charges therefore should be published with the Commission in tariffs, in compliance with Section 6 of the Act to Regulate Commerce and the appropriate tariff circulars of the Commission (R. 137). In compliance with this decision, the Yards Company withdrew Supplement No. 1 to its Tariff No. 3, in which it undertook to cancel its charges of 50 cents and 75 cents for loading and unloading, and continued to collect these charges (See Par. 33 of Defts.' Ex. 1, R. 237, 243). Thus, the effect of this decision of the Commission was to require the Yards Company to continue to charge and collect its increased tariff charges for loading and unloading live stock, in accordance with its tariff on file with the Commission.

Thereafter, upon petition for rehearing filed by various parties, the Commission reopened its Dockets 1118 and 9977 and held further hearings, the testimony and exhibits introduced on these hearings being introduced in this record as Defendants' Exhibits 7 (R. 269) and 23 to 35, inclusive (R. 276-283). All these exhibits are certified to this court as original exhibits. On this additional record, the Commission issued its further report on July 15, 1920, at 58 I. C. C. 164 (Pltfs.' Ex. 2, R. 141, *et seq.*).

In this report, the Commission reversed its previous finding that it was the duty of the shippers to load and unload live stock at the Chicago yards, and held that this was a duty imposed upon the carriers under the law (R. 144), and that since this service was a part of the transportation of live stock, the collection of separate charges therefor from the shippers in addition to the line-haul

rates was an unlawful and unreasonable practice (R. 145), and that the shippers who paid and bore the charges for such loading and unloading, and who were parties of record to the case, had been damaged and entitled to reparation with interest (R. 146). The Commission also adhered to its previous finding that the Yards Company was a common carrier engaged in interstate commerce (R. 144).

With respect to the loading and unloading charges of the Yards Company, the Commission held that inasmuch as the obligation to load and unload live stock at the Chicago stockyards was included in the line-haul transportation and no extra charge could be made for the service, it was not necessary to pass upon the reasonableness of the established charges of the Yards Company for that service; that it (the Commission) had jurisdiction over those charges and could consider their propriety at any time upon complaint of any party (R. 145). It should be remembered that at the time of this report, and at all times prior thereto, back to May 21, 1917, the increased charges of the Yards Company of 50 cents a car for unloading and 75 cents a car for loading live stock were and had been in effect in a tariff on file with the Commission pursuant to the requirements of the Commission's first report (Pltfs.' Ex. 1, Tr. 121, *et seq.*).

Thereafter, on February 25, 1921, a second complaint was filed by the Chicago Live Stock Exchange and docketed under the Commission's Docket No. 12614 (Defts.' Ex. 3, R. 257, *et seq.*). This complaint named the Director General of Railroads as agent, the Yards Company, and a large number of line-haul railroads as defendants. It contained substantially the same allegations as the prior complaint carried under the Commission's Docket No. 9977, and further alleged that it was filed in order to secure reparation on shipments moving since the date of

the filing of the complaint in Docket No. 9977. It did not attack the reasonableness of the increased loading and unloading charges of the Yards Company.

One hearing was held by the Commission on this complaint, the testimony and exhibits offered being introduced in this record as Defendants' Exhibits 8 (R. 269) and 36 (R. 282). These exhibits are certified to this court as original exhibits. On April 8, 1922, the Commission entered an order (Defts.' Ex. 4, R. 267, 268) reopening Docket 9977 and consolidating it with Docket 12614 for further hearing. This further hearing was held, the testimony and exhibits received thereon being introduced in this record as Defendants' Exhibits 9 to 11, inclusive (R. 270) and 37 to 44, inclusive (R. 283-291). All these exhibits, except Exhibit 44, which is printed in the record (R. 289-291), are certified to this court as original exhibits.

Following these hearings, the Commission made its third report on June 2, 1925, at 100 I. C. C. 266 (Pltfs.' Ex. 3, R. 147, *et seq.*). After stating the issues presented in Dockets 9977 and 12614, this report found that the collection of separate charges from complainants and interveners for loading and unloading live stock at the Chicago Yards, during the periods mentioned, was an unlawful and unreasonable practice (R. 150), and awarded reparation to petitioners, as factors and agents for the shippers. The record being insufficient to determine the amount of that reparation, petitioners were directed to prepare statements in accordance with Rule V of the Rules of Practice of the Commission, for submission to the defendants for verification. If not verified, they were to be filed with the Commission for a check upon the record with a view to the entry of an order awarding reparation. The Yards Company was also authorized to waive the collection of any loading and un-

loading charges provided for by its tariffs and which had accrued but had not been collected (R. 156).

Respondents having refused to verify the Rule V statements referred to by the Commission in its report of June 2, 1925, the Commission, on December 12, 1927, without further hearing, entered the order sued on herein (Pltfs.' Ex. 4, R. 157, *et seq.*). With respect to this order, it was stipulated that this action is to recover only those amounts which are preceded by the designation "U. S. Y. & T. Co. and D. G." for some railroad. The amounts not preceded by the initials "D. G." are not involved (R. 209). That the statements filed with the Commission were not agreed to by respondents appears from a subsequent report and order of the Commission dated May 14, 1928, and entered in Dockets 9977 and 12614 (Pltfs.' Ex. 5, R. 210, *et seq.*).

On November 27, 1928, another order was entered (Pltfs.' Ex. 6, R. 214, *et seq.*), making still further changes in the names of certain members of the Chicago Live Stock Exchange, petitioners here. The foregoing comprises a statement of all the opinions and orders issued or made by the Commission in connection with the litigation. Upon the refusal of respondents to pay the reparation awarded by the Commission, this suit was brought.

These are the essential facts upon which, we submit, the decision of the Circuit Court of Appeals was based, and which should be emphasized to enable this court to pass upon the petition for certiorari. It will be observed that, after all, this suit was brought to recover part of the increased loading and unloading charges collected under that tariff of the Yards Company which became effective May 21, 1917. This tariff actually went into effect, in accordance with the law. The Commission de-

nied the request of the Yards Company for permission to cancel that tariff, and by the order entered in Investigation & Suspension Docket 1118, required that it be kept in full force and effect.

In accordance with the requirement of that order, the Yards Company kept the tariff in effect during the entire reparation period, and under it, the collection of those charges sued for herein was made. In neither complaint filed with the Commission was any attack made upon those charges. No evidence was introduced to prove that they were unreasonable or otherwise in violation of the law. On the contrary, the Commission said in its first report that no attempt had been made to prove the charges unreasonable and in its second report that it was not necessary to pass upon their reasonableness.

Notwithstanding this lack of attack on the charges of the Yards Company, the lack of evidence to prove their unlawfulness and the failure of the Commission to find them illegal, the reparation order sued on herein required the Yards Company to refund part of them. We should add that there was the same lack of evidence to show that the charges of the Director General were illegal and the same lack of any finding to that effect by the Commission. The tariffs containing the line-haul rates on live stock were not even put in evidence and the record does not show the amount of those rates.

SUMMARY OF ARGUMENT.

I.

The petition filed herein assigns no reason justifying the issuance of a writ of certiorari. Most of the questions said to have been decided by the Circuit Court of Appeals were not decided by that court. This affirmatively appears from the opinion of that court. Other matters mentioned in the reasons assigned for the issuance of the writ relate to matters which are unimportant and which were not the basis of the opinion of the Circuit Court of Appeals.

II.

The decision of the Circuit Court of Appeals and the grounds assigned therefor, as they appear in the opinion of that court, furnish no justification for the issuance of a writ of certiorari. That court decided the case in accordance with many decisions of this court, and it is not argued in the petition for certiorari or brief in support thereof that the conclusion of the Court of Appeals, on the ground assigned by it in its opinion, was wrong.

III.

A petition for certiorari will not be granted except under the circumstances named in Rule 38 of this court. The decision of the Circuit Court of Appeals herein presents no question of public interest, no conflict with any other Circuit Court of Appeals, does not constitute a departure from accepted judicial procedure and is not in contravention of decisions of this court. On the contrary it is in accord with many decisions of this court.

ARGUMENT.

I.

THE REASONS RELIED UPON BY PETITIONERS AS JUSTIFYING THE GRANTING OF THE WRIT ARE INSUFFICIENT.

At pages 13 to 19, inclusive, of the petition herein, there is a statement of the reasons relied upon by petitioners for the allowance of the writ. They take the form of statements that the Circuit Court of Appeals erroneously decided certain questions in the case and otherwise erred in making its decision. We may deal with these matters in order.

(1) In the statement of the first reason relied upon for allowance of the writ (p. 13 of the petition), it is said that the Circuit Court of Appeals has held that where a carrier holds itself out in its published tariffs to transport live stock under through rates which include the unloading of such stock, it may collect from the shipper an extra charge for part of the unloading service, using as authority therefor a tariff filed by its agent, and without amending its own tariffs which purport to cover the entire service. The opinion of the Circuit Court of Appeals (R. 389-399) shows on its face that this question was not passed upon, and that it was not an issue before that court.

The statement is also based upon a mistake in fact, since the Director General never held himself out in his published tariffs as being willing to transport live stock and unload it at the Chicago stockyards at the through rate published by him. The tariffs of the Director General, said to contain this undertaking are not even in

the record. Up to May 21, 1917, when the increased loading and unloading charges of the Yards Company became effective, the total charge against a shipper did consist of the line-haul rate, plus the terminal charge of $2 a car, but this resulted from the fact that the absorptions of the line-haul carriers for loading and unloading exactly equalled the tariff charge made by the Yards Company for the service. Subsequent to May 21, 1917, the lawful tariff charge against a shipper for the transportation and the loading or unloading, consisted of the line-haul rate, the $2.00 terminal charge and a 25 cent charge for loading or unloading. The statement is also based upon the assumption that the Yards Company was the agent of the line-haul carriers, a matter to which we shall hereafter refer.

(2) In the second reason relied upon for allowance of the writ (pp. 13 and 14 of petition), it is said that the Circuit Court of Appeals has held that a common carrier may not publish its tariffs as agent for another carrier, and restrict the making of charges thereunder against another common carrier. The decision of the Circuit Court of Appeals shows that this question was not presented to or decided by that court. The tariffs of the Yards Company on file with the Commission during the period of Federal Control, and stating the increased loading and unloading charges, did carry the statement that the charge of the Yards Company was made "as a carrier's agent" (p. 165, Certified Excerpt from Original Exhibits). During the hearings in Investigation & Suspension Docket 1118, the Yards Company did contend that it acted as the agent of the line-haul carriers in loading and unloading stock at the yards, this position being taken to support its claim that it was not performing a common-carrier service in doing this work. In its

first decision (Pltfs.' Ex. 1, R. 137), the Commission said:

> "It is contended that the loading and unloading services are performed by the Yards Company as the carrier's agent, and that its charges, therefore, need not be filed under Section 6 of the Act, whether or not it is a common-carrier in respect to such service."

The Commission, however, held that the Yards Company was a common carrier and was obliged by law to file tariffs stating the charges assessed by it for the common-carrier service of loading and unloading live stock performed by it. We do not concede that the Stock Yards Company was then or is now performing a common-carrier service on its own behalf, in loading and unloading live stock at the stockyards, but the Commission held that it was. It necessarily follows that if the Stock Yards Company was performing a common-carrier service on its own behalf in loading and unloading live stock at the yards, it was performing a service on a shipment in the course of transportation, and that the charges for such service constituted a charge against the shipment and not against a connecting carrier. Under these circumstances, it could not be acting as the agent of another carrier. Otherwise, any common carrier might restrict its tariffs so as to apply to only one party to a shipment, thus relieving other parties of obligations imposed upon them by law.

(3) In the third reason relied upon by petitioners for the allowance of the writ (p. 14 of petition), it is said that the Circuit Court of Appeals has in effect held that the through Chicago rate of the Director General, plus the $2.00 terminal charge which covered the transportation and the unloading, is superseded by the absorption clause published in the tariffs of the Director

General, but which did not absorb all of the loading and unloading charges of the Yards Company. The opinion of the Circuit Court of Appeals shows that this question was not passed upon by that court. The statement is also based upon an erroneous statement of fact. As we have pointed out, the line-haul rates to Chicago constituted no engagement with respect to unloading. Moreover, there is no question of an absorption tariff superseding any other tariff. The absorption tariff of the Director General only provided for the payment of a charge which the shippers would otherwise have had to pay in addition to what they did pay.

(4) In the fourth reason relied upon for the allowance of the writ (pp. 14, 15 of petition) it is said that the Circuit Court of Appeals erred in substituting its judgment for that of the Commission in holding that the classifications in the published tariffs of the line-haul carriers were controlling over the line-haul rates and said $2.00 charge. All that can be said with respect to this statement is that the Circuit Court of Appeals did not pass upon the question stated. It made no holding with respect thereto, except to point out that certain provisions of the line-haul Classifications supported a conclusion already reached on other grounds. The statement of the Commission, quoted in this paragraph, was only a statement of fact conceded by everybody and not denied by the Circuit Court of Appeals.

(5) In the fifth reason for the allowance of the writ (p. 16 of petition), it is said that the Circuit Court of Appeals refused to accept the finding of fact made by the Commission with respect to the duty of the line-haul carriers to unload live stock at the stockyards at Chicago and erred in substituting its judgment for that of the Commission on that subject. It is plain that the Cir-

cuit Court of Appeals did not base its decision on a conclusion as to who should load or unload live stock at Chicago. In any event, the determination of this question was a matter of law within the jurisdiction of the court, since the facts, as stated by the Commission in its second report (R. 144), were not in dispute.

(6) In the sixth reason relied upon for the allowance of the writ (pp. 16 and 17 of petition), it is said that the Circuit Court of Appeals erred in finding that the Stock Yards Company, in effect, collected the charge sued for. This is scarcely a reason for the allowance of a writ of certiorari, and in any event, the question as to who collected the money is not now of importance. The decision of the Court of Appeals was not based to any extent upon its statement as to who actually collected the money from the shipper or consignee. The decision was based upon the fact that the collection, no matter by whom made, was lawful.

(7) In the seventh reason relied upon for the allowance of the writ (pp. 17 and 18 of petition), it is said that the Circuit Court of Appeals erred in holding that the increased charge of 25 cents per car was justified by reason of the increased loss of labor and other expenses in connection with the unloading of live stock. The opinion of the Circuit Court of Appeals shows that it made no such decision. The court did say (R. 397) that it knew judicially of the increased cost of service at the Chicago stockyards and (R. 398) that this increased cost was properly the subject of an increased charge. The court did not, however, pass on the reasonableness of the charge made, since that charge was provided for by tariff during all the reparation period, and had been kept in effect by order of the Commission itself.

(8) The eighth reason relied upon for the allowance

of the writ (p. 18 of petition) is that the decision of the District Court in this case was wrong, in that it is in conflict with decisions of the Commission, is contrary to decisions of this court, and is in conflict with the decisions of other district courts. We submit that the decision of the District Court, even if subject to these objections, may not be relied upon as a reason for the allowance of a writ herein. As appears from the opinion of the District Court (R. 60, *et seq.*), the ground for the decision of that court was that petitioners were not the proper parties in interest, and had no legal right to maintain the action. The Circuit Court of Appeals, however, did not sustain the judgment of the District Court on this ground, saying (R. 394):

> "Our examination of this cause does not so entirely satisfy us of the correctness of the District Court's conclusion thereon as to justify our deciding the appeal upon a ground so formal and technical if a proper result may be reached upon the merits of the cause."

The writ, if granted herein, will be granted to review the judgment of the Circuit Court of Appeals and not the judgment of the District Court. The basis of the action taken by the District Court is of no importance here. That action was, however, right.

II.

THE OPINION AND DECISION OF THE CIRCUIT COURT OF APPEALS AFFORDS NO GROUND FOR A PETITION FOR CERTIORARI.

None of the reasons assigned by petitioners in support of the petition touch upon the actual ground of the decision made by the Circuit Court of Appeals. What that court held was that since neither respondent had collected any amounts in excess of the charges author-

ized by its tariffs, lawfully on file with the Interstate Commerce Commission, and since there was no finding by the Commission that any charge collected by either respondent was unreasonable or otherwise improper, there could be no recovery. This conclusion is demonstrated by the language of the opinion where it is said (R. 396, 397):

> "Whatever the form of the transaction, it seems to us to have been, in essence, but a collecting of the 25 cents by the Stock Yard Co., which, under its published tariff, it was bound in any event to collect. No one was taken by surprise or deceived. The rate had been duly published and shippers or their representatives, the commission men, knew of this charge, and that the Stock Yard Co. would be obliged in some manner to collect it.
>
> No contention is made that the charge itself was unreasonable, or that, taken in connection with the other transportation charges, the entire rate was unreasonable. The extent of the Commission's second conclusion was that the collection of the increased 25 cents was 'an unlawful and unreasonable practice.' The finding that it was an unreasonable practice is not a finding that it was an unreasonable rate."

Further on, referring to the same point, the court said (R. 399):

> "Appellants earnestly urge that the collection of this charge was a tort, and that all participants therein were joint tort feasors. We cannot believe that the Stock Yard Co. committed a tortious act in collecting and receiving its tariff charge, the failure to collect and receive which would have been a breach of its statutory duty. Nor do we understand how the Director General of Railroads became a tort feasor through his continuing the prior practice of receiving from the Stock Yard Co. the entire rate, including the additional loading and unloading charges, and then turning back to the Stock Yard Co. that part of the total charge to which it was entitled. Particularly is this so when there is no pretense that either the charge itself or the entire rate including this charge was excessive."

These quotations state the ground upon which the decision of the Circuit Court of Appeals was based, and petitioners do not urge the action of the court in this respect as a reason for the allowance of the writ. On the contrary, it seems to be conceded in the petition and brief that the collection of the charges of the Yards Company was proper. That this is so cannot be denied. If the Yards Company was a common carrier in performing the loading and unloading service, as the Commission held, Section 6 of the Act to Regulate Commerce imposed a positive duty upon it to file its charges in tariff form with the Commission. *U. S.* v. *U. S. Y. & T. Co.*, 192 Fed. 330; 226 U. S. 286.

Its tariffs being thus filed, the law required it to collect and retain all its charges. *Pennsylvania R. Co.* v. *International Coal Co.*, 230 U. S. 184, 186; *Armour & Co.* v. *United States*, 209 U. S. 56; *Davis* v. *Portland Seed Co.*, 264 U. S. 403, 418, 425. Nor could the Commission require any refund of charges so collected, unless it first found, on a proper record, that the charges were unreasonable or otherwise unlawful. *Baltimore & Ohio R. Co.* v. *United States*, 277 U. S. 291, 301, 302; *F. E. C. Ry.* v. *United States*, 234 U. S. 167. No such finding was made by the Commission in this case with respect to any charge of the Yards Company or the Director General.

Nor may it be argued that the collection of the charges of the Yards Company was the practice condemned by the Commission. The language of the Commission's reports negatives any such conclusion. Moreover, this court has held that a practice may not be condemned by the Commission without evidence that it is unjust and unreasonable. *B. & O. Ry.* v. *United States*, 277 U. S. 291, 300. Certainly, the practice of collecting the charges of the Yards Company could not have been an "unlawful and unreasonable practice", since those charges were

contained in tariffs filed with the Commission as required by the Commission, and had not been held to be in any way unlawful.

Under these circumstances, the case presented to the Circuit Court of Appeals was the same in principle as the case presented to this court in *Interstate Commerce Commission* v. *Stickney, et al.*, 215 U. S. 98. That case involved the propriety of the $2.00 terminal charge assessed by the Yards Company for the use by the line-haul railroads of the railroad that the Yards Company then owned, and which charge had been added by the railroads to their line-haul charges on live stock. In the prior proceedings before the Commission the propriety of the $2.00 charge had been demonstrated, notwithstanding which the Commission entered an order requiring the railroad companies to reduce the charge against the shipper to $1. This court said at page 109:

> "Under those circumstances it seems impossible to avoid the conclusion that, considered of and by itself, the terminal charge of $2 a car was reasonable. If any shipper is wronged by the aggregate charge from the place of shipment to the Union Stock Yards it would seem necessarily to follow that the wrong was done in the prior charges for transportation, and, as we have already stated, should be corrected by proper proceedings against the companies guilty of that wrong, otherwise injustice will be done. If this charge, reasonable in itself, be reduced the Union Stock Yards Company will suffer loss while the real wrongdoers will escape. It may be that it is more convenient for the commission to strike at the terminal charge, but the convenience of commission or court is not the measure of justice."

This language is applicable to the case at bar. If petitioners were permitted to recover, the charges of the Yards Company will be reduced, and that company will suffer loss, although those charges have not been held improper. On the contrary, the Yards Company maintained

them in effect only because required by the Commission to do so. It follows that the reparation order of the Commission, sued on herein, was bad for the reason assigned in the opinion of the Circuit Court of Appeals.

It is obvious from the various reports of the Commission that what that body was trying to do in this case was to require the absorption of the increased charges of the Yards Company by the line-haul carriers. This was the specific relief asked for in the complaint filed in Docket 9977, and was the issue dealt with in the Commission's first report. Such an absorption by the line-haul carriers would have been a complete compliance with the finding of the Commission that the collection of a part of the Yards Company's charges from the shippers, in addition to the rates for transportation, was an unreasonable and unlawful practice. Under such a disposition of the matter, the Yards Company would have collected and retained its charges in accordance with the Commission's conclusions with respect thereto, but the shippers would not have been required to pay any part of them.

This conclusion is strengthened by the fact that on February 29, 1920, there became effective that amendment to Section 15 of the Act to Regulate Commerce which required the payment of the charges of the Yards Company by the line-haul carriers, a circumstance referred to by the Commission in its second report dated July 15, 1920 (Pltfs.' Ex. 2, R. 143). This also is the thought that runs through the petition and brief in support thereof filed herein. The entire argument made to this court is that the Director General should be required to pay the increased charges of the Yards Company, there being no contention that the retention and collection of those charges by the Yards Company was improper.

Whether or not this is a thing that may be lawfully

done directly concerns the Director General, but we call attention to the fact that there is no order of the Commission finding any impropriety or unreasonableness in any charge for transportation assessed by the Director General, no finding of any discrimination resulting from his failure to absorb the charges of the Yards Company, and no conclusion or finding that he should make this additional absorption. In the absence of such findings, it would seem clear that no such requirement could be imposed upon the Director General in the courts.

III.

THE PETITION HEREIN URGES NO REASON OR GROUND JUSTIFYING THE GRANTING OF A WRIT OF CERTIORARI.

Paragraph (b) of Rule 38 of this court specifies the grounds upon which this court will grant a writ of certiorari to a Circuit Court of Appeals, and the grounds mentioned therein have been considered by this court in a number of adjudicated cases. If this case does not present a ground specified by the rule as justifying the issuance of the writ, the petition will be denied.

As we have pointed out, the opinion of the Court of Appeals does no more than hold that when the tariffs of common carriers lawfully on file with the Commission specify the charges to be collected for transportation service performed thereunder, those charges must be collected and retained, and that an order of the Commission requiring a refund of them is invalid in the absence of a finding of impropriety or illegality in the collection and retention of such charges. This is not a new principle of law, since, as we have pointed out, it has been affirmed and reaffirmed by this court in many decided cases.

The decision of the Circuit Court of Appeals herein is not in conflict with the decision of any other Circuit Court of Appeals, but is in accord with many decisions of this court. It does not decide an important question of local law in any way, since, as appears from the petition (p. 3), the law involved is a Federal law. It has not decided an important question of general law in a way in conflict with the weight of authority, since its opinion is supported by many decisions of this court. It has not decided an important question of Federal law which has not been, but should be, settled by this court, since the grounds upon which the Court of Appeals has decided the case are grounds which have been repeatedly recognized and approved by this court. It has not departed from the accepted and usual course of judicial procedure or sanctioned a departure therefrom by the lower court. On the contrary, it has done nothing more than decide this case in accordance with what is by now "horn book" law.

The circumstances under which a petition for certiorari will be granted are well set out in decisions of this court. In *United States* v. *Rimer*, 220 U. S. 547, a writ which had been granted on the theory that the rule established by the lower court would overthrow established practices was dismissed when it appeared that the ground upon which it was granted did not exist. In this case no established rule is or could be overthrown by the decision of the lower court. The obligation of railroads to load and unload live stock at public markets has been fixed by statute since March 1, 1920. In *Layne, etc. Company* v. *Western Wells Work*, 261 U. S. 387, the writ of certiorari was dismissed by this court as having been improvidently granted, on the ground that the question involved was not one of importance to the public and did not present a conflict of opinion as between Circuit Courts of Appeal.

This case is of no importance except to the parties and presents no such conflict. In *Magnum Company* v. *Coty*, 262 U. S. 159, this court said at page 163:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing."

The case at bar presents no disagreement between Circuit Courts of Appeal and involves no question of any importance to the public. In *Southern Power Company* v. *North Carolina, etc. Company*, 263 U. S. 508, the writ of certiorari previously granted was dismissed when it appeared that the cause did not involve a question of importance to the public. In *Keller* v. *Adams-Campbell Co.*, 264 U. S. 314, a patent case, the writ of certiorari was dismissed because the case presented no important issue of general patent law.

These decisions of this court would seem to control in the case at bar, which, as we have said, presents no question of public interest, involves no disagreement between Circuit Courts of Appeal and is in fact, nothing more than an ordinary action at law between private parties. Petitioners' complaint in effect is that they lost the case and what they desire is another hearing in this court.

We submit that the petition for certiorari should be denied.

Respectfully submitted,

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